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IN THE COURT OF APPEALS OF IOWA

IN THE INTEREST OF S.M.F., A Child;	)	Filed September 30, 1987
S.H., Natural Mother,	)	7-93
Appellant.	)	86-1367

Appeal from the Iowa District Court for Linn County (No. JT 581-0186), Sylvia A. Lewis, Juvenile Referee.

The natural mother of an eleven-year-old boy appeals from the juvenile court order which terminated her parental rights pursuant to Iowa Code section 232.116(5) (child in need of assistance who has been transferred from parents' custody for at least twelve months cannot be returned there). **REVERSED AND *REMANDED.***

Barbara R. Hickok of Hickok & Dolezal, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General; Gordon E. Allen, Special Assistant Attorney General; Valencia Voyd McCown, Assistant Attorney General; and Susan R. Flaherty, Assistant County Attorney, for appellee, State of Iowa.

Heard by Oxberger, C.J., and Donielson and Hayden, JJ.

DONIELSON, J.

The natural mother of an eleven-year-old boy appeals from the juvenile court order which terminated her parental rights. We reverse and remand.

S.M.F. was born October 11, 1975. His mother, S.H., was sixteen years old at the time of his birth. S.H. claims T.M. is the biological father of S.M.F., but T.M. denies paternity. G.F. was named as father at the time of S.M.F.'s birth. Neither T.M. nor G.F. has acted as a father to S.M.F. Neither T.M. nor G.F. appeared to resist termination of parental rights, and neither is involved in this appeal. S.H. voluntarily placed S.M.F. in foster care in February 1980 when she was arrested on bad check charges. In 1980 two reports of child abuse and neglect were received by the Department of Human Services, although no formal findings of neglect were made.

In 1986, the State of Iowa petitioned to terminate the parental rights of S.H. pursuant to Iowa Code section 232.116(5) (1985). With reference to the elements to prove under this section, it is undisputed that S.M.F. was adjudicated a child in need of assistance in 1981, pursuant to Iowa Code section 232.96, that S.M.F. had been placed out of his mother's home for more than twelve months, and that S.M.F. cannot be returned to his mother's care at this time.

The foster parents with whom S.M.F. has lived since 1980 have requested that S.M.F. be placed in another home in the near future. S.M.F. does not want termination but would consider it if he could be adopted by his foster parents. The record reveals S.M.F. has grown quite fond of his foster parents. The foster parents are not amenable to adoption of S.M.F.

S.H. has been incarcerated for the majority of the time since the adjudication. She has attempted to maintain contact with S.M.F. by telephone, letter, and face-to-face contact. The record discloses many rule infractions by S.H. while incarcerated. She has not successfully completed case plans prepared

for her by the Department of Human Services. In 1985, S.H. was convicted of armed robbery and sentenced to serve a term of five to twenty-five years. S.H. maintains she is innocent of this charge. There was testimony to the effect a petition for postconviction relief would be filed. When S.H. is released, it is her desire to make a home for her son with her boyfriend in Des Moines.

S.M.F. does not desire termination. At trial a psychologist testified that S.M.F. has an attachment to his mother, that termination is not in the child's best interest, that losing his foster parents and also his mother would be detrimental to him, that it is unlikely S.M.F. will ever be returned to S.H.'s custody, that S.M.F. would try to sabotage an adoptive placement, and that S.M.F. should be placed in a two-parent home with no other children. An adoption specialist testified that S.M.F. is an adoptable child, even with his behavioral problems, but recognized that successful adoption is diminished with older children.

The juvenile court entered an order granting the termination petition. S.H. has appealed from this order under Iowa Code section 232.116(6)(c), which states that "the court need not terminate the relationship between parents and child if the court finds that there is clear and convincing evidence that such termination would be detrimental to the child at the time due to the closeness of the parent-child relationship."

On appeal, we review parent-child terminations de novo. In Interest of K.L.C., 372 N.W.2d 223, 227 (Iowa 1985). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7). Central to a determination of this nature are the best interests of the child. In Interest of Dameron, 306 N.W.2d 743, 745 (Iowa 1981). We consider the child's long-range as well as immediate interests. Id.

The question presented for our determination is a troubling one: How will the best interests of S.M.F. be served? On the one hand, S.M.F. needs stability and some type of permanency established in a home, as well as care, affection, and guidance. He will not receive this attention from his mother as long as she is incarcerated. Since she was convicted in 1985 for a period of five to twenty-five years and has demonstrated an inability to obey the rules, we do not foresee her release to be in the near future. On the other hand, we have cumulative testimony that S.M.F. does not want termination of his mother's parental rights. We have before us testimony of the detrimental effect termination would cause to S.M.F.

The record discloses that S.M.F., age eleven at trial, does not desire termination. A child's objection to termination may be considered under section 232.116(6) if the child is over ten years of age. In Interest of L.P., 370 N.W.2d 839, 843 (Iowa 1985). We recognize that a child's wishes do not take precedence over his best interests. Id.

A major focus of our concern is with the psychological evaluation of S.M.F. A psychologist spent two days testing and conversing with S.M.F.; he came to the conclusion it would not be in S.M.F.'s best interest to terminate parental rights and recommended long-term foster care and retention of parental rights even over adoption. The following excerpts of his testimony demonstrate his concerns:

> Q. * * * When we were talking over the telephone, you were discussing what your opinion was as to losing the stability of the [foster home] and having termination of parental rights happen at the same time. Can you describe your feelings as to that to the Court, please? A. I should preface that by emphasizing again my firm belief that S.M.F. is seeking adult approval, acceptance and affection. He has found that to a considerable degree in the [foster] home even though he does resist the details of their discipline and management. He also has a significant affectionate tie with his biological mother. She's a figure in his thinking, his behavior, and his feelings. He does feel accepted and loved by her even though

he's frequently frustrated by some undependability in her contact with him, letters and phone calls and those things. He will now inevitably move from that secure foster home and he will not, therefore, have that base for emotional security. It's my belief that at the same time if he were to be told by society that he can no longer maintain contact or somehow or the other feel proper in his affection for his biological mother if her parental rights were terminated, I think we would be assaulting this child with two major losses and two major sources of instability and two serious threats to his real need for adult, social, but adult primarily, acceptance, love, and affection.

* * *

Q. You think that S.M.F. wants to live with his mother again if that's possible? A. We did not ask him that. He has no illusions about his being reunited with her in the foreseeable future. He has adapted to periodic contacts by phone, by letter, or on occasion, visits. He has fully accepted his living with the [foster family], which I interpret as accepting the fact that he's going to be living physically separately from his biological mother.

* * *

Q. Do you believe that termination of parental rights would be harmful to S.M.F.? A. I see no direct benefit to him from terminating rights, nor do I see direct harm from terminating parental rights, but the negative impact of terminating his legal relationship to his biological mother, the emotional complications I would see as somewhat more indirect, but real.

* * *

Q. And is part of your conclusion that parental rights not be terminated based on your belief that S.M.F. is not a likely candidate for adoption? A. Yes.

Q. If you felt that S.M.F. could be adopted by a family, would that be preferable to having him placed in foster family care? A. No.

Q. You would still recommend long-term foster family care? A. Yes.

Q. And you still recommend that knowing it's likely to be an unstable placement? A. Yes.

Testimony was elicited concerning S.M.F.'s behavioral problems, mood swings and capability of sabotaging an adoption placement, and the fact that the failure rate is higher for older children desiring adoption. Because of these factors and because S.M.F. does not desire adoption unless it would be with his foster family (who has stated that adoption is not feasible), the adoption alternative does not seem to be a very workable one.

It appears that the basic reason to justify termination of S.H.'s parental rights is due to S.H.'s absences because of incarceration for a majority of S.M.F.'s

life. Although there were allegations of neglect in 1980, there was no formal finding of such neglect. The CHINA petition was instigated based on S.H.'s incarceration, not based on neglect charges.

At trial an attorney with an extensive counselling background testified she felt S.H. did not commit the armed robbery for which she is currently serving time. She felt S.H. had demonstrated substantial growth throughout the years and that S.H. possessed the ability to be a good mother.

It is uncertain when S.H. will be released from the women's reformatory. Despite S.H.'s incarceration, there have been contacts between S.H. and S.M.F.; S.H. has demonstrated her concern for S.M.F. There is a bond between S.M.F. and S.H.; there is also a bond between S.M.F. and his foster parents. The bond between S.M.F. and his foster parents will be severed soon because his foster parents desire S.M.F. to be placed elsewhere. That situation cannot be helped.

But are we doing justice by also terminating the bond between S.M.F. and his mother? The choice is not an easy one. Based on the unique set of circumstances on which we have to form our decision and weighing heavily the testimony of the psychologist, we cannot now say that termination is in S.M.F.'s best interests. Termination is an ultimate drastic action which severs all legal ties between a child and his parent. We recognize that S.M.F. has not enjoyed the normal type of mother-child relationship due to S.H.'s continuous absences. S.H.'s incarceration is one very important factor in this case; however, we have to look at the total picture here and review the other evidence and testimony.

We find that clear and convincing evidence has been shown to demonstrate that termination of S.H.'s parental rights would be detrimental to S.M.F. due to the closeness of the parent-child relationship; consequently, we reverse and remand to the trial court to reinstate S.H.'s parental rights. Custody of S.M.F.

should remain with the Department of Human Services for continued foster family care, with an appropriate case plan submitted to include reasonable visitations with S.H.

REVERSED AND REMANDED.